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No. _____

In The

Supreme Court of the United States

October Term, 1989

JAMES A. MITCHELL, JR.,

Petitioner,

vs.

ASSOCIATED BUILDING CONTRACTORS OF N.W. OHIO, INC., etc. & RUDOLPH/LIBBE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the jury have sufficient evidence of an egregious policy of racial discrimination when it awarded punitive damages to the petitioner when he proved that he was a victim of the respondent's minimum or maximum percentage quota system which was maintained for fifteen years after a balance of white and black bricklayers was attained by the company? Or more specifically, can an employer, after attaining a balanced workforce, maintain any percentage quota, minimum or maximum, without being liable for hiring on the basis of race?

II. Did the district court commit reversible error when it refused to permit the petitioner to introduce evidence under Section 1981 as to the motivation of the respondent in *adopting* the quota system in 1974; in refusing to grant the petitioner's request for jury instructions with reference to the quota system, and in granting a new trial on both liability and amount of compensatory damages?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are James A. Michell, Jr., a licensed black bricklayer journeyman, who is petitioner and plaintiff/appellant, and Rudolph/Libbe, Inc., a construction contracting firm, who is respondent and defendant/appellee.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

JURISDICTION 1

STATUTE RELIED UPON 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 6

I. The decision of the Sixth Circuit is in direct and irreconcilable conflict with the precedent established by this Court in *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987) and *United Steelworkers v. Weber*, 443 U.S. 193 (1979) 6

II. The decision of the Sixth Circuit is in direct and irreconcilable conflict with precedents established by this Court in *Connecticut v. Teal*, 437 U.S. 440 (1982); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *City of Los Angeles Water & Power v. Manhart*, 435 U.S. 702 (1978) 8

III. The affirmance of the Sixth Circuit's benign quota doctrine by this Court would not only destroy the superstructure underlying civil rights in employment law – the right of each individual to equal employment opportunities and equal treatment based upon merit and the right to be free from permanent preferential treatment, but would also immunize the most virulent form of discrimination – invidious intent – by blurring the distinction between Phase I and Phase II 10

ARGUMENTS 11

TABLE OF CONTENTS – Continued

Page

I. The respondent had an affirmative duty to abandon its quota system after it had attained a balanced work force of 10, 13, or any percent of black bricklayers, because in continuing to hire according to percentages, it was continuing to hire because of race and not because of merit 11

A. The affirmative duty of the respondent to abandon the quota system and hire all bricklayers on merit after a balance was attained 11

B. The respondent company admitted that it maintained a quota system of hiring 10% black bricklayers and between 13% and 19% minorities after it has attained a balanced work force 13

C. The Circuit Court's holding that a quota system maintained after a balance has been attained is legally permissible if an employer hires in excess of the proportionate number of black bricklayers in the labor force thereby increasing the hiring quota of blacks to 18-19% constitutes not only reversible error but is clearly erroneous, having absolutely no support in the record 15

D. A jury has a right to award punitive damages against a company which has discriminated against black bricklayers under a quota system for a period of fifteen years 18

II. The District Court committed reversible procedural errors 19

A. The district court refused to permit the petitioner to introduce any evidence concerning the respondent's motivation in adopting the quota system in 1974 19

TABLE OF CONTENTS – Continued

Page

B. The district court refused the petitioner's request for instructions to the jury 20

C. The district court granted a new trial on compensatory damages, not only in respect to the amount of the damages, but also on the liability phase – that phase on which the court agreed with the jury in the first trial that respondent committed a § 1981 violation 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert denied*, 416 U.S. 957 (1974) 10

City of Los Angeles Water & Power v. Manhart, 435 U.S. 702 (1978) 8

City of Richmond v. J.A.Croson, 109 S.Ct. 706 (1989) 21

Connecticut v. Teal, 437 U.S. 440 (1982) 8

Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985) 19

Fountilla v. Carter, 571 F.2d 487 (9th Cir. 1978)..... 19

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) 8, 9

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 314, 73 L.Ed. 2d 835..... 19

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 7, 21

Johnson v. Transportation Agency, Santa Clara County, 107 S.Ct. 1442 (1987) 6, 7, 12

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. ___, 108 S.Ct. 3019 (1986) 13

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 20

Quarles v. Phillip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968)..... 20

Smith v. Wade, 461 U.S. 30 (1983) 19

Steelworkers v. Weber, 443 U.S. 193 (1979)..... 6, 7, 12

Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252, 97 S.Ct. 355 (1977) 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1254(1) (1976) 1

LAW REVIEW ARTICLES

Kaplan, "Equal Justice in an Unequal World," 61 *Northwestern L.Rev.* 363 18

TREATISES

Baldus-Cole, *Statistical Proof of Discrimination*, Shepard's McGraw-Hill (1980) 20

Wright and Miller, *Federal Practice and Procedure*, § 2814 21

JURISDICTION

Petitioner seeks review of the September 20, 1989 judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the district court.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE RELIED UPON

Petitioner relies upon 28 U.S.C. § 1254(1):

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

STATEMENT OF THE CASE

I. FACTS AND BACKGROUND

The respondent, Rudolph/Libbe, Inc., a general contractor with its headquarters in Toledo, Ohio, performs construction work at many job sites in the Toledo area. The petitioner, James A. Mitchell, Jr., a black bricklayer, is a resident of Toledo, Ohio, and has worked as a bricklayer in the Toledo area since 1971. Approximately 13% of the bricklayers in the Toledo area are black. Prior to 1974, it was the practice of the company to hire one or two

black bricklayers, either Pearson or McNeil, the exact number depending upon the total number of bricklayers required at a site. The usual number working at a site ranged between 15 and 20 bricklayers. The issue of qualifications is not present in this case as company officials have admitted that there is no distinction between the skills of white and black bricklayers.

In 1974, the respondent in pursuit of government contracts devised and proceeded to implement the "Toledo Hometown Plan". This Plan was designed to comply with the requirements of Executive Order 11246, which required contractors to make good faith efforts to eliminate manifest imbalances in their work forces caused by their past discrimination. Under the Executive Order and the Hometown Plan, contractors were required to hire a sufficient number of qualified black bricklayers so as to have a representative work force – a proportion of black bricklayers commensurate with their availability in the local work force. The Executive Order specifically prohibited discrimination, encouraging contractors to drop any affirmative action plan when a balanced work force was attained. Under the Toledo Plan, there was no affirmative duty.

The signatories to the Toledo Hometown Plan agreed to submit monthly minority reports to the Department of Labor (OFCCP) which showed the percentage of blacks and minorities hired the previous month and the underutilization or overutilization of blacks and minorities in the various trades and crafts employed by the contractors. Fixed goals or quotas were agreed upon by the signatories – the hiring of 11.7% minorities in 1970 and 13% in 1976 as ceilings, not as floors. After 1974 the

respondent would hire a black bricklayer, either Pearson or McNeil, and then hire in chronological order from an all-white preferential hiring list nine white bricklayers. This process of hiring 10% black bricklayers on job sites was maintained for 15 years, from 1974 to the present. At no time throughout this 15 year period of time did the company ever hire a black bricklayer after it had satisfied its 10% quota. The petitioner after being rejected many times because of the quota system brought suit under Section 1981 in November 1983, charging the company with racial discrimination. He specifically charged that the respondent operated under a quota system which automatically rejected him because of his race and that this system was maintained for 15 years after the company attained a racially balanced work force in 1974. Immediately after the suit was filed, the respondent hired the petitioner in October 1983, but laid him off on January 27, 1984. In April 1984, the petitioner re-applied at Rudolph/Libbe but was rejected. His name was never placed on the preferential hiring list, which was the practice of the company with former white employees.

The respondent defended its quota system, continuing to maintain its 10% black bricklayers and 13% minorities since 1974, by contending that the local OFCCP officer, James Spencer, told it that it was perfectly legal under Executive Order 11246 to maintain such balances. Company officials freely admitted that it maintained fixed percentages for blacks and minorities, although it argued that at times the company exceeded the 13% for minorities, raising the quota to 18% or 19%. [Holzman, Transcript of the trial commenced on June 21, 1988, hereinafter referred to as TT-II, pp. 218-221] It also admitted

that it has always and continues today to hire on percentages. It hires black bricklayers "to keep our percentages up" [Kawczynski, TT-II, p. 203], and by "up", it means at 10%. It admits that it never hired a black bricklayer at any time in its history, exceeding its quota of 10% [Kawzynski, TT-II, pp. 195-198], and that its preferential hiring list favors the white bricklayers [Kawczynski, TT-II, pp. 187-189], and that its hiring system is based upon race [Kawczynski, TT-II, pp. 185-187, 203]. The jury at the first trial after appraising the documentary and oral evidence awarded the petitioner $200,000 in punitive damages and $10,000 in compensatory damages.

II. DECISION BELOW

In its decision on September 20, 1989, the Sixth Circuit said, at page 2:

> "The district court granted appellee's motion for a new trial in the event an appellate court reversed the court's granting of the j.n.o.v. motion. The district court also conditionally granted appellee's motion for a new trial; if appellant did not accept the court's remittitur on compensatory damages ($10,000 to $1,504) within 30 days, the new trial motion would be granted. Appellant refused to accept the remittitur."

The court while agreeing with the jury that the respondent was liable for violating Section 1981 ordered a new trial on both the liability and damages aspects of the case. At the new trial on compensatory damages, the district court rejected the petitioner's request for jury instructions concerning the effect of the quota system and also refused to accept the petitioner's offer of evidence

relating to the respondent's motivation for adopting the quota system in 1974.

The Sixth Circuit affirmed the district court. It said: "It is clear that Rudolph/Libbe used no affirmative action plan which set maximum quotas for blacks or other racial minorities. Rudolph/Libbe representatives testified that it hired blacks and minorities in excess of its minority goals." This language suggests that if a company exceeds or elevates its minimum quota percentage of blacks to a higher percentage quota, in effect establishing a higher quota for blacks, that new quota after attaining a balanced work force is legally permissible. The circuit court made no distinction between the law governing Phase I of an affirmative action program, the pre-balancing stage, when a manifest imbalance exists which at times justifies a preferential affirmative action program, and Phase II, where a party, after attaining a balanced work force, has an affirmative duty to abandon the affirmative action program and substitute equal treatment or merit and colorblindness for preferential treatment and color consciousness. The court also made no attempt to compel the respondent to meet its burden of proof in Phase I or Phase II demonstrating that its plan was temporary, remedial, and met the purposes of a legal and permissible affirmative action program. The court made no references to any support in the record for the conclusion that the respondent had hired any black bricklayers after it attained its quota of 10% nor did the company cite any legal authority for the proposition that an employer can maintain a permanent quota system after attaining a balanced work force if it at times exceeds the minimum proportion of blacks and establishes a new quota system.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE SIXTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE PRECEDENT ESTABLISHED BY THIS COURT IN *JOHNSON v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY,* 107 S.Ct. 1442 (1978) AND *STEELWORKERS v. WEBER,* 443 U.S. 193 (1979).

In *Johnson, supra,* this Court held that the purpose of an affirmative action program or quota system was "to attain a balanced work force, not to maintain one." An employer cannot "use its plan to maintain a permanent racial and sexual balance." In *Weber,* this Court held that the plan was "designed to break down discriminatory patterns of racial and segregation and hierarchy." *United Steelworkers v. Weber,* 443 U.S. 193, at 208 (1979). In the instant case the Court of Appeals held that the minimum quota or goal of 10-13% for hiring black and minority bricklayers was not a maximum quota or goal – a ceiling, but simply a floor. The company, the Court said, hired in excess of the minimum quota, and supported this statement by referring to the testimony of certain company officials. The inference appears to be that these officials might have testified that the company hired any "excess" blacks or minorities at random, on the basis of merit, and not according to any given static percentage. The testimony referred to by the Court was the testimony of the company president, Mr. Rudolph, who said: "Our policy is one . . . that requires our company personnel to maintain or exceed the percentage of work force." [Rudolph, TT-II, p. 373] and the vice president, Mr. Holzman, who

testified: "We strive to reach 12-13%." [Holzman, TT-II, p. 208] and "I don't know that we ever exceeded, gotten that high, to 20%." [TT-II, 218-221] Both individuals were referring to minorities, non-blacks. This testimony does not point to hiring on the merits, but rather to the opposite – "keeping our percentages up". [Kawczynski, TT-II, p. 203] The testimony evidences the fact that the company at times operated under a new and different maximum quota system, a new ceiling, ranging between 13% to 19%. Instead of the minimum floor of 10 to 13%. This constitutes a benign quota which is prohibited in civil rights employment cases because it constitutes in Phase II not hiring upon the basis of merit and equal treatment but hiring upon the basis of race.

An employer who manages to make progress in closing the gap between group disparity does not become entitled to a license to discriminate against the remaining members of the minority group. The fact that an employer may enhance minority group chances of obtaining a job, e.g., in this case from a 9-1 chance to an 8-2 chance or any better chance is of little comfort to the minority victims who are excluded from employment because of their race. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). An employer who maintains a preferential hiring system, hiring certain percentages based upon race after balancing his work force, is discriminating on the basis of race and has violated the legal principle established by this Court in *Johnson* and *Weber*. He is making decisions based on racial percentages and not on the merit of the individual. The victims find

the door closed to them and it matters little to them that the door might be opened more frequently in the future.

II. THE DECISION OF THE SIXTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE PRECEDENTS ESTABLISHED BY THIS COURT IN *CONNECTICUT v. TEAL*, 437 U.S. 440 (1982); *FURNCO CONSTRUCTION CO. v. WATERS*, 438 U.S. 567 (1978); AND *CITY OF LOS ANGELES WATER & POWER v. MANHART*, 435 U.S. 702 (1978).

The respondent company testified that it had a policy of "MAINTAINING" the percentage of 13% – "absolutely" [TT-II, pp. 190-191], but occasionally at times MAINTAINED between 13% and 19% [TT-II, pp. 218-221]. This is a benign quota. The Court of Appeals in its opinion in effect held that benign quotas gave a license to employers to discriminate against black bricklayers. The fact, the Court seemed to say, was that since the employer had hired in excess of its minimum quota of 10-13% and hired at times up to 18-19% minorities or black bricklayers, proved that the employer was in good faith – that he allocated more than the black bricklayers' "fair share" of jobs to the petitioner and members of his class. The implication appears to be that the minorities have only entitlement to a certain share of jobs – their proportionate share of the market as determined by their representation in the labor market. The "tipping point" may be a little above their representation in the market.

This Court in *Connecticut v. Teal, supra*, held that a benign quota – a balanced work force, a predominately

minority work force, or even an all minority work force does not constitute a defense to an individual charge of discrimination. There are no "benign quotas" or "tipping points" in employment, unlike housing and education. In Phase II, when the employer has a balanced work force, the individual employee's rights supersedes the group rights. Equal opportunity based on individual merit is the goal, not group integration or representation in the work force. In *Furnco, supra,* a disparate treatment case whose principles have always been held applicable to §1981, this Court said: "It is clear that Congress never intended to give an employer a license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." 437 U.S. 440. "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco, supra,* 438 U.S. at 579. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." 438 U.S. at 579.

The fact that an employer achieves a balanced work force or more than a balanced work force does not excuse racial discrimination against individuals like the petitioner and members of his class. These people have a right not to be discriminated against by an employer – a right to be judged on their merits. What the respondent did to him is discrimination because of race, no matter

how many members of the minority group were hired before the benign quota was applied.

III. THE AFFIRMANCE OF THE SIXTH CIRCUIT'S BENIGN QUOTA DOCTRINE BY THIS COURT WOULD NOT ONLY DESTROY THE SUPERSTRUCTURE UNDERLYING CIVIL RIGHTS IN EMPLOYMENT LAW – THE RIGHT OF EACH INDIVIDUAL TO EQUAL EMPLOYMENT OPPORTUNITIES AND EQUAL TREATMENT BASED UPON MERIT AND THE RIGHT TO BE FREE FROM PERMANENT PREFERENTIAL TREATMENT, BUT WOULD ALSO IMMUNIZE THE MOST VIRULENT FORM OF DISCRIMINATION – INVIDIOUS INTENT – BY BLURRING THE DISTINCTION BETWEEN PHASE I AND PHASE II.

Under the law in Phase I, the manifest imbalance stage, temporary preferential treatment extended to minorities is permissible until the imbalance has been rectified. This leveling period has been deemed necessary and it is expected that once a balance comes into existence, preferential treatment ceases, and true equality and equal treatment based on merit will prevail. "Our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. . . .Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (lst Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). In employment law, preferential treatment, a drastic remedy, is a temporal measure, a means and a process to reach the ultimate goal – equal

employment opportunities, while in housing and education, it is a permanent measure, for there the ultimate goal is integration, not equal opportunity. In the instant case, the Court of Appeals has placed the group above the individual, thereby giving the employer a blank check to discriminate on the basis of race at will once he has reached any type of benign quota system. This permits the employer to carve out separate domains based on race – to reconstruct the wall he was ordered to tear down in Phase I. In Phase II, it is the law of the market and merit which should determine employment, not a policy of racism. In this case, the employer can select 8 white bricklayers and then 2 black bricklayers. There is no social justification for this intentional selection by race. Each bricklayer, once a balanced workforce exists, should be selected on his merits, regardless of race.

ARGUMENTS

I. THE RESPONDENT HAD AN AFFIRMATIVE DUTY TO ABANDON ITS QUOTA SYSTEM AFTER IT HAD ATTAINED A BALANCED WORK FORCE OF 10, 13, OR ANY PERCENT OF BLACK BRICKLAYERS, BECAUSE IN CONTINUING TO HIRE ACCORDING TO PERCENTAGES, IT WAS CONTINUING TO HIRE BECAUSE OF RACE AND NOT BECAUSE OF MERIT.

A. The affirmative duty of the respondent to abandon the quota system and hire all bricklayers on merit after a balance was attained.

Race conscious selection remedies are universally condemned by society but under certain conditions

where high social compelling values are involved, our legal process permits a temporary use of them. In certain "hospital" cases when all alternative remedies have failed, rationing by color is allowed and thus a valid affirmative action program may constitute a defense to charges of discrimination. Such a plan, however, must meet certain conditions: (1) the plan must be designed to "eliminate a manifest, racial imbalance in traditionally segregated job categories," (2) the plan must utilize the least drastic means for the attainment of goals and not "unnecessarily trammel the interests of the white employees," and (3) the plan must be a temporary measure to eradicate the imbalance caused by the segregation and one which will not call for additional preferences to "maintain racial parity once the overall goal is achieved." *Steelworkers v. Weber*, 443 U.S. at 197. A preferential plan employing a quota is valid if it is reasonably adapted to achieving the objective of eliminating a conspicuous or manifest imbalance and such an imbalance exists when a significant disparity exists between the percentage of black bricklayers employed and their availability in the labor force. Once, however, that balance is eliminated, the employer must abandon the quota system because there no longer is any social necessity for it. Congress was very clear about temporary and permanent quota systems. "Any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII, because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong.Rec. 7213 In *Johnson*, this Court said that the purpose of a quota system is "to attain a balanced work force, not to maintain one." 107 S.Ct.

1442, ___ (1987). Employers "cannot use its plan(s) to maintain a permanent racial and sexual balance. . . ." *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. ___, 106 S.Ct. 3019 (1986).

B. The respondent company admitted that it maintained a quota system of hiring 10% black bricklayers and between 13% and 19% minorities after it has attained a balanced work force.

(1) The respondent admitted that it maintained a quota system after it attained a balance of 10% black bricklayers.

"Q Do you attempt to maintain the percentage?

"A Absolutely.

"Q How is that percentage arrived at?

"A I really don't know.

"Q You maintain 13 percent?

"A In most cases, yes." [Kawczynski, transcript of second trial commenced on June 21, 1988, hereinafter TT-II, pp. 190-191]

(2) The company had a policy of hiring one black bricklayer in order to attain a parity of 10% black bricklayers and then hiring in automatic fashion, without considering the merit or qualifications, from a preferential hiring list, 10 white bricklayers.

[Kawczynski, TT-II, pp. 178-186.] This was the custom of the entire contracting industry in the State of Ohio. [Kawczynski, TT-II, pp. 176 177.]

(3) The respondent admitted that when it hired its quota of white bricklayers, it called the union hall and hired a black bricklayer "to keep our percentages up."

[Kawczynski, TT-II, p. 203.]

(4) The respondent admitted that its hiring from an all white preferential hiring list was discriminatory.

[Kawczynski, TT-II, pp. 187 189.] (See Appendix D)

(5) The respondent company never hired a black bricklayer after it satisfied its quota of 10%.

[Kawczynski, TT-II, pp. 195-198.] (See Appendix D)

(6) The respondent company admitted that it never once exceeded its quota of 13% in hiring non-black minorities after attaining a balanced work force.

Mr. Holzman, the company vice president, was asked upon cross examination:

"Q You know whether Mr. Kawczynski ever hired a black after the quota was reached?

"A Mr. Kawczynski has hired minorities after the quota, but actually whether blacks, or not, I cannot tell you. * * * we only look at minority as a total class. We don't differentiate blacks.

* * *

"Q Has Mr. Kawczynski ever hired a minority after the quota was filled, of up to, say 20 percent?

"A I don't know that we ever exceeded, gotten that high, to 20 percent."
[Holzman, TT-II, pp. 218-221.]

(7) The respondent company admitted that it hires black bricklayers because of race and not merit after it has obtained a balanced workforce.

At the conclusion of his cross examination and after having testified to calling the union hall only when it needed blacks "to keep its percentages up", Mr. Kawczynski was asked:

"Q So it is your testimony that you are requiring a person because of his race?

"A At times.

"MR. AFFELDT: That's all I have. I am going to make a motion for a directed verdict, Your Honor.

"THE COURT: Overruled." [TT-II, p. 203]

C. The Circuit Court's holding that a quota system maintained after a balance has been attained is legally permissible if an employer hires in excess of the proportionate number of black bricklayers in the labor force thereby increasing the hiring quota of blacks to 18-19% constitutes not only reversible error but is clearly erroneous, having absolutely no support in the record.

The Court of Appeals held that an employer does not have an affirmative duty to abandon a quota system after a balance has been attained if there is evidence that the

employer hired black bricklayers in excess of their proportionate representation in the labor force. The Sixth Circuit did not say that the company was hiring at random, on merit, after a balance was attained but admitted that it was hiring on the basis of a quota system, but a quota system more favorable to black bricklayers than the minimum quota system. This evidence of good faith, the Court seems to be saying, gives the employer a license to maintain this new quota system. Aside from the fact that this view would lead the courts to a policy of approving racism in civil rights it is also clearly erroneous insofar as it has no support in the record. The respondent admitted that it never hired at random, on merit at any time in the last 15 years, since the inception of the affirmative action program. It hired black bricklayers "to keep our percentages up" [TT-II, p. 203]; it never hired more than 19% minorities [TT-II, pp. 218-221]; it never hired a black bricklayer after attaining 10% [TT-II, pp. 195-198]; and its entire system of hiring was based on race [TT-II, pp. 185-197, 203].

Even if it were assumed that the respondent did hire black bricklayers in excess of their proportionate representation in the labor force, the principles enunciated by this Court in Johnson and Weber are still applicable. The company is still maintaining a policy based on the systemic exclusion of blacks. The only difference is that the respondent instead of maintaining a quota of 10% or 13% is now maintaining a quota ranging from 13% to 19%. The hiring of an additional minority gives the company a license to hire 8 white bricklayers to 2 black bricklayers instead of the previous ratio of 9 white bricklayers to 1 black bricklayer. This is still systemic discrimination,

hiring on the basis of race, no matter what mask it may pose under. It is not hiring on the basis of merit.

It is respectfully submitted that the source of confusion in this area stems from the proclivity of most people to identify quota systems in housing and education (bussing) with quota systems in employment. The goals are completely different. In housing and education, the primary goal is "integration," the attainment and maintenance of a proportionate balance of blacks and whites. This balance is necessary in view of the fact that exceeding the "tipping point" obstructs integration by causing white flight. In employment, however, the primary goal is not integration, but rather the provision of "equal opportunities" to an economic advantage, a job. There is no problem in the industrial arena with "white flight." If a manifest imbalance exists in Phase I, a proportionate representation of minorities is desired (integration), but not as an ultimate end, but only as means to obtain equal opportunities in Phase II – equal treatment on the basis of merit.

> "When we move from the problems of employment to those of another critical area, housing, our focus changes considerably. We are, as a practical matter, no longer concerned with preferential treatment – no one has advocated reserving the best housing for negroes. Rather, we meet a very different issue – the benign quota. While the preferential quota specifies a lower limit on the number of employees – the employer must hire at least so many negroes – the benign quota is always an upper limit – you may have no more than a certain percentage of negroes in a given apartment house. . . . The reason for this restricted definition is that while preferential treatment in employment serves a

> whole series of values, the benign quota advances just one – integration."

Kaplan, "Equal Justice in an Unequal World," 61 *Northwestern L.Rev.* 363, at 388-389.

The result of the Sixth Circuit's decision is that an employer could establish benign quotas in the employment arena by determining the "fair share" of jobs to be held by minorities and by whites, not according to merit, but by rationing them out according to color – to what he believes is fair. In employment, in Phase II, when a balanced workforce has been attained, satisfying group justice, there is no such thing as "fair" or "proportional" shares. Section 1981, interpreted in the same manner as equal treatment under Title VII, is based upon the concept that the individual is the fundamental unit of the Act and he has the right to be judged on his merits and not as a member of a group. A defense based upon the United Appeal campaign "I gave them their share" is not applicable in Phase II. An employer cannot maintain any percentage, minimum or maximum, proportional representation or more than a proportional representation of minorities in his work force after he has obtained a balanced work force. To affirm an employer's right to do so, is to affirm hiring on the basis of racism and not merit.

D. A jury has a right to award punitive damages against a company which has discriminated against black bricklayers under a quota system for a period of fifteen years.

This Court has held that a plaintiff who proves a 1981 violation may recover punitive damages where the "defendant's conduct is shown to be motivated by evil

intent or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The most important factor in the consideration of punitive damages is whether a policy of discrimination existed and whether that policy injured many people. If a pattern and practice of discrimination existed before institution of suit and worse after suit, and is still in operation, as in this case, an almost conclusive presumption exists that punitive damages should be awarded, for punitive damages looks primarily to future deterrence. *Creamer v. Porter*, 754 F.2d 1311 (5th Cir. 1985); *Fountilla v. Carter*, 571 F.2d 487 (9th Cir. 1978). The record in this case meets these conditions.

II. THE DISTRICT COURT COMMITTED THE FOLLOWING REVERSIBLE PROCEDURAL ERRORS

A. The district court refused to permit the petitioner to introduce any evidence concerning the respondent's motivation in adopting the quota system in 1974.

Under 42 U.S.C. § 1981, the petitioner has the burden of showing purposeful or invidious discrimination. *General Building Contractors Ass'n v. Pennsylvania*, 438 U.S. 375, 102 S.Ct. 314. To prove that a quota system violates Section 1981, a party must show that the plan was either adopted or maintained for an invidious purpose and that the plaintiff was a victim of the plan. It is therefore evident that a petitioner must be given an opportunity to show that the 1974 quota system was adopted by the respondent not to eliminate any manifest imbalance, but simply employed as a pretext to lock out 90% of the black bricklayers. See, *Village of Arlington Heights v. Metropolitan*

Development Corp., 429 U.S. 252; *Quarles v. Phillip Morris, Inc.* , 279 F.Supp. 505, at 508 (E.D. Va. 1961), and Baldus-Cole, *Statistical Proof of Discrimination*, Shepard's McGraw-Hill, (1980), p. 37 ¶1.223.

B. The district court refused the petitioner's request for instructions to the jury.

The district court refused the petitioner's request for instructions to the jury which were based upon the respondent's quota system. The Sixth Circuit upheld this ruling saying that "the requested instructions were not significantly different from those given." [Decision, 6th Cir., 9-20-89, p. 8] This conclusion by the Sixth Circuit is troublesome insofar as the petitioner's instructions dealt with a policy of discrimination that existed for 15 years, [See, Appendix E; also TT-II, pp. 263-265], while the instructions given to the jury consisted of references to isolated acts of purported discrimination, based on the rationale of a *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) case. [See, TT-II, pp. 394-407.] The petitioner's instructions were based on completely different theory and were diametrically opposed to the respondent's proposed instructions which the trial court adopted.

C. The district court granted a new trial on compensatory damages, not only in respect to the amount of the damages, but also on the liability phase – that phase on which the court agreed with the jury in the first trial that respondent committed a § 1981 violation.

This Court has held in Title VII and Section 1981 cases that liability and damages are distinct and separable – that the determination of liability is made out in

Phase I and that if liability is found, the determination of damages is made out in Phase II. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). "The most common example is the granting of a new trial limited to damages when liability has been properly determined." Wright and Miller, *Federal Practice and Procedure*, §2814, p. 93. In this case, the district court properly determined liability by agreeing with the jury on the respondent's liability and there is not the slightest connection in this case between liability and damages. Both concepts are separate and distinct. The issues are not interwoven, but distinct and separate. In such cases the court lacks discretion to retry an issue on which it and the first jury agreed. This is judicial activism and an affront to the jury system.

CONCLUSION

The petitioner James A. Mitchell's situation is not atypical or unique. He has been a victim and suffered from a misguided affirmative action program for a period of over 15 years. The decisions by the district and circuit courts brings to the surface the confusion surrounding the permissible ambit of affirmative action programs in this country, especially the relationship between affirmative action in employment, housing and education. The latest decision by this Court on affirmative action, *City of Richmond v. J. A. Croson*, 109 S.Ct. 706 (1989) has generated more heat than light by the commentators. Confusion reigns in this area. It is respectfully suggested that accepting this case would provide the Court with an opportunity to clarify this important problem which goes

to the core of civil rights and prevent future abuses of affirmative action programs.

Respectfully submitted,

ROBERT J. AFFELDT, ESQ.

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Petitioner

TABLE OF APPENDICES

Appendix A – Decision, Sixth Circuit Court of Appeals, 9-20-89, No. 88-3953, *Mitchell v. Associated Bldg. Contractors of N.W. Ohio, etc. & Rudolph/Libbe, Inc.*.....1A

Appendix B – Memorandum and Order, U. S. District Court, C 83-1066, 9-7-88, *Mitchell v. Associated Bldg. Contractors of N.W. Ohio & Rudolph/Libbe, Inc.*.....1B

Appendix C – Memorandum and Order, U. S. District Court, C 83-1066, 6-25-87, *Mitchell v. Associated Bldg. Contractors of N.W. Ohio, etc. & Rudolph/Libbe, Inc.*..1C

Appendix D – Excerpts from Trial Transcript in C 83-1066, commencing on 6-21-88....1D

Appendix E – Petitioner's Requested Jury Instructions.....1E

APPENDIX A

NO. 88-3953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES A. MITCHELL, JR., ET AL.,
Plaintiff-Appellant,

v.

ASSOCIATED BUILDING CONTRACTORS OF N.W. OHIO, INC., ETC., & RUDOLPH/LIBBE, INC.
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

DECIDED AND FILED Sept. 20, 1989

Before: **MARTIN, WELLFORD,** and **MILBURN,** Circuit Judges.

PER CURIAM. This is a difficult case in which appellant, a black bricklayer, claims under § 1981,[1] that several defendants, including appellee Rudolph/Libbe, Inc., a

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[1] Section § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, an exactions of every kind, and to no other.

(Continued on following page)

general contractor in the Toledo, Ohio area, discriminated against him. Appellant contends that Rudolph/Libbe generally hired only individuals who had worked for them previously and maintained a 13 percent maximum minority hiring quota. Therefore, appellant contends that appellee denied him employment on the basis of race.

This case also has a complex procedural history. A trial was held in which the jury awarded appellant $10,000 in compensatory damages and $200,000 in punitive damages. The district court granted appellee's j.n.o.v. motion on the issue of punitive damages, stating that the evidence did not support said award. Alternatively, the district court granted appellee's motion for a new trial in the event an appellate court reversed the court's granting of the j.n.o.v. motion. The district court also conditionally granted appellee's motion for a new trial; if appellant did not accept the court's remittitur on compensatory damages (from $10,000 to $1,504) within 30 days, the new trial motion would be granted. Appellant refused to accept the remittitur.

A new trial was held which resulted in a judgment for appellee. At this trial appellant sought to base his entire claim on the evolution and use of a quota system.

(Continued from previous page)

In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Court reaffirmed the principal that § 1981 extends to discrimination by private parties. *Id.* at 2372 (reaffirming *Runyon v. McCrary*, 427 U.S. 160 (1976)). The Supreme Court also expounded on the scope and meaning of this civil rights statute. Section 1981 "forbid[s] discrimination in the 'mak[ing] and enforce[ment]' of contracts alone." *Patterson*, 109 S. Ct. at 2372.

The district court limited his proof to actions occurring within the six year statute of limitations, refused to give an instruction other than one modeled on the pattern of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and denied his motion for j.n.o.v.

On appeal, appellant challenges the propriety of the reversal on punitive damages and the remittitur after the first trial, and the propriety of the denial of several motions, including one for j.n.o.v., during the second trial. We affirm. We hold first that it was proper for the district court to reverse the punitive damages award and seek a remittitur on the compensatory damage award.

The decision of the district court to grant a new trial based on the excessiveness of the damages or, alternatively, to request a plaintiff to file a remittitur, is reviewable only for abuse of discretion. *Manning v. Altec, Inc.*, 488 F.2d 127, 123 (6th Cir. 1973). "The test adopted by the court is that it will ' . . . reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range." ' " *Id.* at 133 (quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969)) (emphasis in original); *see also Smith v. John Swafford Furniture Co.*, 614 F.2d 552, 553 (6th Cir. 1980) (same); *Brewer v. Uniroyal, Inc.*, 498 F2d 973, 977-78 (6th Cir. 1974) (same).[2]

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[2] Both appellant and appellee rely on the standards for the review of a jury award articulated in *Rodgers v. Fisher Body*

(Continued on following page)

In reviewing the record and standard approved in our prior authority, we conclude that the district court did not abuse its discretion in granting a new trial, or effectuating a remittitur, because the size of the verdict was not supported by the evidence. There was insufficient evidence about damages caused by Rudolph/Libbe's failure to hire Mitchell, even assuming evidence that Rudolph/Libbe did discriminate as charged because of its proportionate use of minority employees. The evidence relating to emotional injury was extremely vague and "[t]his court has granted a greater degree of deference to the decision of the trial court where the remitted portion is not the subject of direct evidence but rather results from inference drawn from the facts in evidence." *Smith*, 614 F.2d at 554; *see Manning*, 488 F.2d at 133; *see also Brewer v. Uniroyal, Inc.*, 498 F2d 973, 977-78 (6th Cir. 1974) (reversing remittitur sought by district court). The

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(Continued from previous page)

Division, General Motors Corp., 739 F.2d 1102, 1109 (6th Cir. 1984). This case states that the standard is " '[W]hether the award is so high as to shock the judicial conscience and constitute a denial of justice.' " *Id.* (quoting *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978). The standard announced in *Rodgers* relates only to appellate review of damage awards and not to appellant review of a district court's decision to grant a new trial (or a remittitur) on the basis of the size of the verdict. *See Rodgers*, 739 F.2d at 1109; 11 C. WRIGHT & A. MILLER, FED. PRAC. & PRO. § 2820, at 135 (1973 & 1989 Supp.). Therefore, *Rodgers* is inapposite.

$10,000 award, while not large, was not "clearly within the reasonable range,"[3] based on the record.

A prevailing plaintiff in a § 1981 action may be eligible for "punitive damages in an appropriate case." *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2375 n.4 (1989). Punitive damages may be recovered "only under circumstances where the 'defendant's conduct is shown to be motivated by evil intent, or where it involves reckless or callous indifference to the federally protected rights of others.' " *Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, 1108-09 (6th Cir.), *cert. denied*, 108 S. Ct. 259 (1987) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). The court stated further that "[t]he imposition of punitive damages in civil rights actions [, including § 1981 actions,] has generally been limited to cases involving egregious conduct or a showing or willfulness or malice on the part of the defendant." Id. at 1109. *See also Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir. 1989) (stating "the standard for punitive damages for discrimination in violation of civil rights is that the discrimination must have been 'malicious, willful and in gross disregard of [plaintiff's] rights' "); *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert.*

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[3] Conditioning a new trial with a remittitur is not a concession by the trial court that the liability issue is unassailable so that the new trial must be on damages only. The practice of a new trial conditioned on rejection of a remittitur is well established. *See* 11 C. WRIGHT & A. MILLER, FED. PRAC. & PRO. § 2815, at 100.

denied, 109 S. Ct. 564 (1988) ("Punitive damages are recoverable for conduct exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right").

To determine whether the district court properly granted a motion for judgment notwithstanding the verdict (j.n.o.v.), the court must determine whether there was insufficient evidence in the record to present a question of fact for the jury's consideration. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The question is one of law for the reviewing court to determine de novo. *Id.* at 1104-05. In considering whether the evidence is sufficient to support the verdict, the appellate court may neither weigh the evidence, pass on the credibility of the witness, nor substitute its judgment for that of the jury. Instead, the evidence must be viewed in the light most favorable to the nonmovant, drawing from the evidence all reasonable inferences in that party's favor. *Id.* at 1104. Granting a j.n.o.v. is improper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *Beauford*, 816 F.2d at 1107.

Upon careful review of the evidence *presented at the first trial*, the district court properly determined that the evidence could not support imposition of punitive damages. Evidence of Rudolph/Libbe's hiring practices demonstrated, at worst, a hiring system based on utilization of previously employed individuals. Recognizing that such a system, with a predominantly white workforce, might perpetuate the predominantly white workforce,

Rudolph/Libbe used a minority hiring goal of 13 percent on all of its hiring, for both federal and nonfederal projects. Mitchell never once alleged or proved that less qualified white persons, or persons with a lesser connection to Rudolph/Libbe, were hired over him. The proportion established was higher than the proportion of minority bricklayers in the Toledo area. There was no showing of egregious conduct or malice which would permit the award of punitive damages.

We also hold that the district court properly handled the motions challenged from the second trial. Appellant contends that the district court erred in not granting his motion for j.n.o.v. following the second trial. He argues that the evidence was unrebutted that Rudolph/Libbe, through its alleged quota system, denied him employment simply because he was black. Rudolph/Libbe has denied consistently that it used an illegal quota system; witnesses testified that minorities were hired from time to time despite Rudolph/Libbe's efforts to maintain a minimum goal of approximately thirteen percent minority workers. Other circumstantial evidence regarding Rudolph/Libbe's minority recruitment and practices rebutted assertions of intentional discrimination; therefore there was sufficient evidence to support the verdict in the second trial.

It is clear that Rudolph/Libbe used no affirmative action plan which set *maximum* quotas for blacks or other racial minorities.[4] Rudolph/Libbe representatives testified that it hired blacks and minorities in excess of its

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[4] The Supreme Court's recent public employer "quota" cases are not deemed to be relevant here. *See City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989).

minority goals. Simply because it monitored its minority workforce, in order to participate in federal and government projects, does not indicate use of a "maximum" quota. Rudolph/Libbe produced a great deal of evidence to show that appellant was dismissed because there was no work available or that he was not hired because there were no present openings.

With respect to the verdict in the second trial, Rudolph/Libbe is entitled to have the evidence construed in the light most favorable to it, including all reasonable inferences. That evidence and those inferences are sufficient to support the jury resolution.

Appellant further contends that the district court's denial of his request for instructions on direct discrimination was error. The requested instructions were not significantly different from those given and the district court was not in error in rejecting them. In effect, appellant sought instructions that argued his facts for him. Defendant-appellee was entitled to instructions that stated that it would not be liable if appellant was not hired for "legitimate nondiscriminatory reasons." *See Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786 (1989) (plurality opinion).

Appellant also contends that the district court erred in refusing to admit evidence of discrimination occurring prior to the six year statute of limitations bar date. *See Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 522 (6th Cir. 1975). The district court, however, allowed the admission of evidence relating to appellant's prior contacts with Rudolph/Libbe to show intent to discriminate. It simply

held that such evidence could not support a damage award extending to a time before the limitations period.

Appellant could recover for injuries sustained after and including 1978, six years prior to his complaint's filing. At trial, the court allowed testimony of all of appellant's contacts with Rudolph/Libbe, namely his alleged first application and employment in 1975. It allowed testimony regarding the Toledo Area Affirmative Action Program for Construction Industry[5] and Frederick Rudolph's role in its establishment. It refused admission of evidence relating to applications for employment between 1971 and 1978, although the record does not indicate that any applications were actually made by Mitchell. The court refused admission of evidence relating to the collective bargaining agreement (which allowed employers to hire up to 25% of employees from outside the local union for the alleged purpose of getting more white employees).

Appellant contends that he should have been able to admit evidence that Rudolph/Libbe instituted a quota system when no need for it existed. He alleges that this alleged practice constituted a "continuing violation" actionable even though some of the acts occurred outside the bar date, relying upon *Held v. Gulf Oil Co.*, 648 F.2d 427 (6th Cir. 1982). We find no error in the evidentiary rulings challenged. *See* Fed. R. Evid. 401. The district

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[5] The Toledo Area Affirmative Action Program for the Construction Industry (also known as "The Toledo Home Town Plan") was instituted by the Federal Department of Labor and in an effort to improve minority participation in the skilled construction trades.

court made careful determinations about what evidence was relevant (weighted against prejudicial value) to provide ample background information to the trier of fact in this case.

The decision of the district court is accordingly **AFFIRMED**.

A TRUE COPY
Attest:
LEONARD GREEN, CLERK

By /s/ (illegible)
Deputy Clerk

ISSUED AS MANDATE: October 11, 1989
COSTS: None

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OHIO WESTERN DIVISION

James A. Mitchell, Jr.,

Plaintiff

vs.

Associated Building Contractors of Northwestern Ohio, Inc., et al.,

Defendants

Case No. C 83-1066

MEMORANDUM AND ORDER

(Filed Sept 7, 1988)

POTTER, J.:

This cause is before the Court on plaintiff's motion for judgment notwithstanding the verdict, motion for a new trial, defendant's opposition, plaintiff's reply, defendant's motion to tax costs and plaintiff's opposition.

A motion for judgment notwithstanding the verdict must be granted if there was insufficient evidence in the record to present a question of fact for the jury's consideration. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied* 441 U.S. 906 (1979).

> In determining whether the evidence is sufficient to support the verdict, this court may neither weigh the evidence, pass on the credibility of witnesses, nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in that party's favor.

Beauford v. Sisters of Mercy, 816 F.2d 1104, 1107 (6th Cir.) *cert. denied*, 108 S. Ct. 259 (1987) (*citing Morelock*, 586 F.2d

at 1104). Therefore, a motion for judgment notwithstanding the verdict must be granted when the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *Id.* at 5 (citing *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171, 177-78 (6th Cir. 1981).

Plaintiff's motion for judgment n.o.v. is based on his assertion that the evidence presented would support but one reasonable conclusion, that defendant's hiring of bricklayers was based on an unlawful quota system. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). The Court does not agree with plaintiff's assessment of the evidence presented at trial. The record does not support plaintiff's assertion that the only reasonable verdict could be one for plaintiff. Furthermore, the issue of whether a quota system existed was not presented to the jury in such a direct fashion. In essence, plaintiff's motion is directed at the Court's refusal to direct a verdict in his favor upon his claim that the existence of an unlawful quota system had some how been established as a matter of law. On either basis, plaintiff's motion is not well taken.

This case was instituted by plaintiff against eighteen defendants including various contractors, construction companies and unions. At the time of trial only defendant Rudolph/Libbe, Inc. remained. The case was one for disparate treatment, not one to institute an affirmative action program. The evidence was sufficiently in conflict to make an issue for the jury on discriminatory animus. For example, there was ample evidence submitted by defendant's President and by plaintiff's own witness,

James Spencer, Director of the Hometown Plan, that defendant did not employ a quota system.

Plaintiff has also moved the Court to grant a new trial. If the Court determines that the verdict is against the clear weight of the evidence, a motion for a new trial should be granted. *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The Court is given broad discretion in granting a motion for a new trial. *Id.* When considering a motion for a new trial, the court may weigh the evidence. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816 (6th Cir. 1952). However, the court may not reweigh the evidence and set aside the verdict unless the verdict is against the clear weight of the evidence. *Bruner*, 684 F.2d at 425.

The verdict in this case was not against the clear weight of the evidence. This motion is actually directed at what plaintiff claims were erroneous rulings by the Court on evidentiary matters. The basis for those rulings is adequately set forth in the record of the trial proceedings and is not subject to review on a motion for a new trial. Regardless of whether the Court should have admitted the excluded evidence, the jury's verdict was not against the clear weight of what was admitted. The motion for a new trial is not well taken.

Defendant has moved this Court for an order taxing certain expenses as costs and has submitted its bill of costs to which plaintiff asserts said costs are not properly taxable. Defendant is entitled to recover its costs pursuant to Fed. R. Civ. P. 54(d). Fees which may be taxed as costs are set forth in 28 U.S.C. §1920 and a substantial

body of case law has arisen to assist courts in determining when specific items of expense sought may properly be taxed. The Court cannot determine whether the costs sought by defendant are properly taxable from the material submitted. Defendant's motion will be held in abeyance and defendant granted leave to file a memorandum in support of its motion, to which plaintiff may respond.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiff's motion for judgment notwithstanding the verdict be, and hereby is, DENIED; and it is

FURTHER ORDERED that plaintiff's motion for a new trial, be, and hereby is, DENIED; and it is

FURTHER ORDERED that defendant is granted twenty-one days to submit a memorandum in accordance with this order.

/s/ John W. Potter
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James A. Mitchell, Jr.,

Plaintiff

vs.

Associated Building Contractors of Northwestern Ohio, Inc., et al.,

Defendants

Case No. C 83-1066

MEMORANDUM AND ORDER

(Filed June 25, 1987)

POTTER, J.:

This matter is before the Court, pursuant to Fed. R. Civ. P. 50(b) and 59(a), on defendant Rudolph/Libbe/ Inc.'s (defendant) motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur on plaintiff's claims against defendant under 42 U.S.C. §1981 and plaintiff's opposition.

Defendant contends that

1. The evidence presented at trial points so strongly in favor of defendant Rudolph/Libbe that reasonable minds can come to but one conclusion as to the proper verdict, and that conclusion is that plaintiff's race was not a factor in defendant's employment decisions regarding plaintiff;

2. The evidence was absolutely lacking in any acts by defendant to support any award of punitive damages;

3. In the alternative, a new trial should be granted because the verdict is against the clear weight of the evidence and because the awards

of compensatory and punitive damages are excessive based upon the evidence and as a matter of law.

See Defendant's Motion for Judgment Notwithstanding the Verdict at 1-2.

On April 7, 1987, this Court began a jury trial on plaintiff's claims of discrimination because of race by defendants. Plaintiff, a black brick mason, alleged that defendants discriminated against him in defendants' employment of plaintiff because of plaintiff's race. On April 13, 1987, the jury found for plaintiff and against defendant and awarded compensatory damages of $10,000.00 and punitive damages of $200,000.00. In compliance with Fed. R. Civ. P. 50(b), defendants moved for a directed verdict at the close of plaintiff's case in chief and at the close of all the evidence.

The motion for judgment notwithstanding the verdict must be granted if there was insufficient evidence in the record to present a question of fact for the jury's consideration. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied* 441 U.S. 906 (1979). In determining "whether the evidence is sufficient to support the verdict, this court may neither weigh the evidence, pass on the credibility of witnesses, nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in that party's favor." *Beauford v. Sisters of Mercy*, No. 85-1477/1631 slip op. at 4-5 (6th Cir. April 22, 1987) (citing *Morelock*, 586 F.2d at 1104). Therefore, a motion for judgment notwithstanding the verdict must be granted when the evidence is such that there can be but

one reasonable conclusion as to the proper verdict. *Id.* at 5 (citing *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171, 177-78 (6th Cir. 1981).

Under 42 U.S.C. §1981, plaintiff must establish that defendant discriminated against him in employment thereby treating plaintiff differently than defendant's white employees, and that this treatment was the result of discriminatory purpose or intent. *General Building Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 374 (1982). Therefore, the factual inquiry is whether the defendant intentionally discriminated against plaintiff.

As to defendants' contentions that plaintiff's race was not a factor in defendant's employment decision, the Court does not find that there can be but one reasonable conclusion. Therefore, since sufficient evidence existed to allow the jury to determine that defendant treated plaintiff differently than white employees and that this treatment was the result of discriminatory purpose of intent, defendant's motion for judgment notwithstanding the verdict is not well taken.

Defendant also claims that the motion for judgment notwithstanding the verdict should be granted regarding the award of $200,000.00 for punitive damages. "The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant." *Beauford* at 7 (citing *Wolfel v. Bates,* 707 F.2d 932, 934 (6th Cir. 1983). Therefore, "where the 'defendant's conduct is shown to be motivated by evil motive

or intent, or when it involves reckless or callous indifference to the federally protected rights of others' " punitive damages are warranted. *Id.*, (citing *Smith v. Wade*, 461 U.S. 30, 56 (1983)). The record in this case is devoid of evidence of defendants' evil intent or callous, reckless or egregious disregard of plaintiff's federal rights. Therefore, since the evidence is such that there can be but one reasonable conclusion as to the proper verdict, defendant's motion for judgment notwithstanding the verdict as to the award of $200,00.00 for punitive damages is granted.

If the Court determines that the verdict is against the clear weight of the evidence, a motion for a new trial should be granted. *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The Court is given broad discretion in granting a motion for a new trial. *Id.* When considering a motion for a new trial, the court may weigh the evidence. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816 (6th Cir. 1952). However, the Court may not reweigh the evidence and set aside the verdict unless the verdict is against the clear weight of the evidence. *Bruner*, 684 F.2d at 425.

Defendant contends that the award of $10,000.00 compensatory damages is against the clear weight of the evidence. Plaintiff's testimony revealed that he was laid off by defendant on January 27, 1984 and that he obtained another job within a week or two. At the time of the layoff, plaintiff was earning $17.71 per hour or $752.00 per week. Plaintiff also testified that he spent approximately fifty percent of his time laid off and looking for work.

Plaintiff also claimed compensatory damages based on the mental distress which he suffered as a result of being discriminatorily laid off by defendant. The only evidence of the mental stress which plaintiff suffered as a result of the layoff was plaintiff's brief testimony. Further plaintiff testified that the emotional strain was mostly felt by plaintiff's wife.

The Supreme Court stated:

> . . . we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under §1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

Carey v. Piphus, 435 U.S. 247, 263-64 (1978).

Although plaintiff may receive damages for emotional distress, plaintiff has not demonstrated his mental distress with the specificity required by *Carey*. *Rodgers v. Fisher Body Division, General Motors Corp.*, 739 F.2d 1102 (6th Cir. 1984).

> It is impossible for the Court to determine what part of the [$10,000 award] the jury apportioned to each to the two aspects of plaintiff's injuries, lost wages and emotional distress. It is clear, however, that plaintiff's evidence was insufficient to support such a large award in

regard to either aspect of his claim for compensatory damages.

Therefore, unless plaintiff notifies the Court in writing of his decision to accept a remittitur of $8,496.00 thereby entitling plaintiff to an award of $1,504.00 within thirty days from the date of this order, the motion for a new trial will be granted.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for judgment notwithstanding the verdict be, and hereby is, GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that defendant's motion for a new trial be, and hereby is, GRANTED subject to the conditions set out in this order; and it is

FURTHER ORDERED that, pursuant to the mandate of Fed. R. Civ. P. 50(c) that in the event the motion for judgment notwithstanding the verdict for the defendant on the issue of punitive damages is reversed on appeal, the alternative motion of defendant for a new trial on the issue of punitive damages is granted because the jury verdict is against the clear weight of the evidence.

/s/ John W. Potter
United States District Judge

APPENDIX D

(p. 187) [Witness: Ed Kawczynski]

white bricklayers than black?

A. Yes.

Q. You know the proporation?

A. No I don't.

Q. Didn't Rudolph/Libbe at any time, ever at one time have more than two black bricklayers?

A. I don't know.

Q. Do you feel, sir – I don't want to use the word "feel" – is it your observation, sir, that this preferential hiring rule has an unfavorable effect upon blacks?

A. No I don't.

Q. Do you recall Mr. Jacobs here –

MR. AFFELDT: Can I mention, Your Honor – I don't want to start objections all over the place.

THE COURT: You may use the deposition for any purpose you wish. My only instruction was we only have one attorney handling the examination, one attorney.

MR. AFFELDT: I didn't know we were using two.

Q. I believe it was what, in April, was it, last year – anyways, do you recall a trial of this case, wherein Mr. Jacobs asked you questions, questioned you?

A. Yes.

Q. The question, page 220:

"Q.: This process very definitely is tilted so that men who have worked previously for your (p. 188) company get their best chance for the next job, isn't it?

A. Yes.

Q. And those former employees happen to be white, then it would be tilted in favor of the chances of a white person getting hired."

Recall that?

A. Yes.

Q. You recall you believe that the best chance of a white being hired under the preferential hiring list?

MR. CONNELLY: You didn't read the answer to the question.

Mr. AFFELDT: You want me to say what Jackson said?

"A.: If they were whites yes, correct."

A. If they were white.

Q. Didn't you testify to the fact that the predominant population of Rudolph/Libbe brick masons were white?

A. Yes.

Q. Page 25, the second deposition that I took. Do you recall me taking your deposition, sir, a few months ago?

A. Yes.

Q. On page 25, here is the question.

"I believe you testified during the trial that this list was tilted in favor of whites. You recall that (p. 189) testimony?

A.: No, I do not.

Q.: Do you recall saying that whites were favored over blacks on the list?

A.: No I do not."

You recall that?

A. Yes.

Q. You still don't recall it?

A. I do recall it.

Q. All right. Directing your attention, sir, to the first day, around the day you were hired, or let's say appointed general superintendent, in February '84, did Mr. Holzman say anything to you about hiring a percentage of minority?

A. He let me know about the company policies, as far as our hiring of minorities.

Q. Could you recall what he said?

A. He said, "We strive to hold a minimum of 13 percent."

Q. Of what?

A. Of minorities.

Q. Does that mean black or all minorities?

A. All minorities.

Q. That include women?

A. No. At the time it did yes, now the law has changed.

Q. So 13 percent?

A. Yes.

* * *

(p. 195) sure you didn't mean that.

MR. AFFELDT: I am sorry.

Q. In 1984 when you became superintendent what was the percentage of minority or blacks?

A. I don't know.

Q. '85?

A. I don't know.

Q. '86?

A. Don't know.

Q. '87?

A. Don't know.

Q. '88?

A. Don't know.

Q. How do you know you ever exceeded 20 percent?

A. It varies weekly.

Q. How could it vary weekly?

A. Because our work force goes up and down weekly.

Q. What week and what year did it ever exceed 20 percent?

A. I don't know.

Q. Mr. Kawczynski, can you tell me any time whether you ever hired a black after you obtained, fulfilled your percentage of 20 percent?

A. I don't know.

Q. Do you stop looking for blacks after you get 20 percent?

A. No.

(p. 196) Q. Name one black that you ever hired after you obtained your quota of 20 percent?

A. I don't know.

Q. Have you ever seen the monthly utilization charts, man hours, that Mrs. Holzman was testifying about today?

A. I could tell you if I seen one.

Q. Pardon?

A. I could tell you if I did if I seen one, what one looked like.

Q. (Handed witness some documents.)

A. No.

Q. You never seen that?

A. No.

Q. After your quote has been filled, any time, say, that 20 percent on this day, say July 1st, at any time on the next 15 hires, at any time was a black hired?

MR. CONNELLY: I am first going to object. He keeps saying "quota 20 percent," and the only testimony has been that there is a minimum of 13 percent. So the question is inaccurate.

MR. AFFELDT: I could put 13, but I try to give the favor of 20 after he said 20 percent.

THE COURT: He can ask the question. It seems it was asked before and answered. Go ahead.

Q. Even after you fulfill your quota of 13 percent, have (p. 197) you ever hired a black?

A. I don't know.

Q. After a quota has been filled, let's say of 13 percent, on the next 15 hires has a black ever been hired?

A. Are you asking hypothetically for me to answer?

Q. I am asking you of your own knowledge.

A. I don't know.

Q. You admitted you get these weekly reports, correct?

A. Correct.

Q. And you do study them?

A. I glance at them.

Q. If you got 13 percent, you don't do anything, do you?

A. That is not correct.

Q. Tell me what you do?

A. We fulfill daily positions as they become open.

Q. After you have got your 13 percent and a vacancy becomes open, name one instance where you hired a black.

A. I don't know.

Q. Let me ask my next question, and my next question is this: After your quota has been filled of 13 percent, and let's say that a vacancy becomes open, did you at any time ever consider hiring a black for that position?

A. If one is available.

Q. Good. Tell me one time after you reached your quota of 13 percent you ever considered hiring a black.

(p. 198) A. I don't know.

Q. Did the company at any time ever have more than four blacks on its payroll in any one month?

A. I have no idea.

Q. Were there any blacks ever on your preferential hiring list.?

A. Yes.

Q. During 1984 tell me one black.

A. Hobert Henry.

Q. During 1985?

A. Excuse me, I didn't hear.

Q. During 1985, you are still using that preferential hiring list, was there ever any black on it?

A. Probably.

Q. Who?

A. Hobert Henry.

Q. 1986?

A. Yes.

Q. Who?

A. Hobert Henry, Jeff Johnson –

Q. Okay. Let's get this clear, because maybe I am still being confusing to you. Is Mr. Johnson an apprentice?

A. He was an apprentice.

Q. Didn't he quit?

A. Yes.

APPENDIX E

Petitioner had requested, in chambers, that the following language be included in the charge to the jury. The Court denied the request.

"Request to Charge No. 1:

"Plaintiff must show the defendant intentionally discriminated against him because of his race. In deciding whether defendant intentionally discriminated because of plaintiff's race, your job is to determine what motivated the person or persons who decided to not hire, transfer, or recall the plaintiff, or to consider him on an equal basis with white bricklayers for vacancies.

"If you find that the defendant's motive was to exclude the plaintiff because of his race, that is, not to hire, transfer, recall, or consider him for certain job vacancies because of his race, then you must find for the plaintiff even if the defendant considered that it had a good faith motive for such exclusion. Evidence of malice or hatred toward blacks is not necessary."

"Request to Charge No. 2:

"If you find that the defendant hired black and white bricklayers under a quota system during a period of time when the plaintiff applied for employment with the defendant or was available for employment but was not considered for employment because the company had fulfilled its quota for hiring black bricklayers, then you must find for the plaintiff since he was not hired "becuase of his race."

If you find that the plaintiff was not recalled to work because the company had fulfilled its hiring quota for

black bricklayers in its workforce, then you must find for the plaintiff since he was not recalled "because of his race".

If you find that the plaintiff was not transferred to other job sites for the defendant company because the defendant had fulfilled its quota for black bricklayers in its workforce, then you must find for the plaintiff since he was not transferred "because of his race."

– Cited from TT-II, pp. 263-265; and excerpted from plaintiff/appellant Mitchell's Reply Brief on Appeal, filed 3-8-89 with the Sixth Circuit Court of Appeals.

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No. 89-998

In The

Supreme Court of the United States

October Term, 1989

JAMES A. MITCHELL, JR.,

Petitioner,

v.

ASSOCIATED BUILDING CONTRACTORS OF N.W. OHIO, INC.
and
RUDOLPH/LIBBE INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in an action asserting intentional race discrimination in employment in violation of 42 U.S.C. section 1981, evidence of the employer's equal employment efforts and employment of minorities is relevant to show the absence of a discriminatory intent by the employer?

2. Whether this Court should review the opinion of a federal court of appeals on issues involving a motion for judgment notwithstanding the verdict, requests for instructions to the jury, a motion for a new trial, and admission of evidence, when the petition fails to state how the opinion conflicts with decisions of this Court or other federal courts of appeals, or decides an unsettled, important question of federal law?

LIST OF ALL PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were plaintiff-appellant James A. Mitchell, Jr., petitioner herein ("Mr. Mitchell" or "petitioner"), and defendant-appellee Rudolph/Libbe Inc., an Ohio corporation, respondent herein ("Rudolph/Libbe" or "respondent").

Pursuant to this Court's Rule 28.1, the Court is advised that Rudolph/Libbe is a wholly owned subsidiary of The Rudolph/Libbe Companies Inc., an Ohio corporation which owns a controlling interest in GEM Industrial Inc., Vista Development Inc., and Vista Capital Group Inc., all Ohio corporations, and Walbridge Inc., a Florida corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i
LIST OF ALL PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS AND JUDGMENTS BELOW 1
STATUTE INVOLVED 1
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 5
ARGUMENT 6
CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Carey v. Piphus, 435 U.S. 247 (1978) 13

Connecticut v. Teal, 457 U.S. 440 (1982) 6, 7

Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59 (1978) 8

Flast v. Cohen, 392 U.S. 83 (1968)..... 8

Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 7

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 8

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) 9

Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975)..... 11

Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)..... 10

Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) 13

Rodgers v. Fisher Body Div., General Motors Corp., 739 F.2d 1102 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) 13

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 8

Teamsters v. United States, 431 U.S. 324 (1977)..... 7

Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464 (1982)..... 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. section 1981 (1982) 1, 7, 13

RULES:

Fed. R. Evid. 401 12

Sup. Ct. R. 17 ..... 9, 14

OTHER:

11 C. WRIGHT & A. MILLER, FED. PRAC. & PRO. section 2815 (1973 & 1989 Supp.) 14

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the two opinions of the United States District Court for the Northern District of Ohio, Western Division, have not been reported, but are Appendix A and Appendices B and C, respectively, of the Petition for Writ of Certiorari.

STATUTE INVOLVED

42 U.S.C. section 1981 (1982) states as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Mr. Mitchell filed his Amended Complaint with the U. S. District Court for the Northern District of Ohio, Western Division, on July 11, 1984, containing a claim of racial discrimination in employment under 42 U.S.C. section 1981 against a number of defendants, including Rudolph/Libbe. Rudolph/Libbe filed an Answer denying Mr. Mitchell's allegations of racial discrimination and raising a number of affirmative defenses.

The district court granted Mr. Mitchell's motion to strike the words "and Title VII" from the Amended Complaint, noting that petitioner had failed to fulfill the administrative prerequisites to suit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 2000e *et seq.*, and later overruled Mr. Mitchell's motion to add a Title VII claim to the Amended Complaint.

At trial, Mr. Mitchell's claim was that his January, 1984, layoff by respondent and its failure later to re-hire him were racially motivated. (Petitioner's Appendix C, pp. 2C, 4C; Petitioner's Appendix A, p. 4A.) Even though Mr. Mitchell never showed "that less qualified white persons . . . were hired over him," the jury awarded $10,000 in compensatory damages and $200,000 in punitive damages. (Petitioner's Appendix A, p. 2A, 7A.) Rudolph/Libbe moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion for j.n.o.v. was granted as to the punitive damages award because the "record in this case is devoid of evidence of [respondent's] evil intent or callous, reckless or egregious disregard of [petitioner's] federal rights." (Petitioner's Appendix C, p. 4C.) The trial court also determined that the evidence was insufficient with regard to both lost wages and emotional distress to support the $10,000 compensatory damages award; the only evidence of mental distress was Mr. Mitchell's brief testimony, and the evidence of lost wages showed, at most, a loss of $1,504. Petitioner was ordered to notify the court of his acceptance of a remittitur of $8,496, resulting in a $1,504 award, or the motion for a new trial would be granted. (Petitioner's Appendix C, pp. 4C-6C.) Mr. Mitchell never

accepted the remittitur and the case was later scheduled for a second trial. (Petitioner's Appendix A, p. 2A.)

"At this [second] trial [petitioner] sought to base his entire claim on the evolution and use of a quota system." (Petitioner's Appendix A, p. 2A.) Mr. Mitchell asserted Rudolph/Libbe's "hiring of bricklayers was based on an unlawful quota system." (Petitioner's Appendix B, p. 2B.) Rudolph/Libbe denied using a quota. (Petitioner's Appendix A, p. 7A.)

> For example, there was ample evidence submitted by [Rudolph/Libbe's] President and by [Mr. Mitchell's] own witness, James Spencer, Director of the Hometown Plan, that defendant did not employ a quota system.

(Petitioner's Appendix B, pp. 2B-3B.) Rudolph/Libbe used evidence of equal employment opportunities for minorities to rebut the claim that it intentionally discriminated. (Petitioner's Appendix A, p. 7A.)

Some evidence at the second trial related to the Toledo Area Affirmative Action Program for the Construction Industry (the "Home Town Plan"), established by the federal Department of Labor "to improve minority participation in the skilled construction trades." (Petitioner's Appendix A, p. 9A.) As a Home Town Plan participant, Rudolph/Libbe "monitored its minority workforce, in order to participate in federal and government projects," using a 13 percent minority hiring goal. Respondent had no maximum quota for black or other minority workers, as Mr. Mitchell claimed. (Petitioner s Appendix A, pp. 7A-8A.) Rudolph/Libbe's evidence was that lack of work and the absence of job openings were

the reasons for the employment decisions made with regard to Mr. Mitchell. (Petitioner's Appendix A, p. 8A.)

After the second trial and a jury verdict and judgment in Rudolph/Libbe's favor, the trial court denied Mr. Mitchell's motions (1) for j.n.o.v. and (2) for a new trial, ruling that (1) the evidence did not support a single conclusion in petitioner's favor and (2) that the verdict was not against the clear weight of the evidence. (Petitioner's Appendix B, pp. 2B-4B.)

Mr. Mitchell appealed to the Sixth Circuit. The court of appeals held that the decision to grant a new trial or request the filing of a remittitur because of excessive damages was not an abuse of discretion. Petitioner's evidence relating to damages was "insufficient" and "extremely vague;" the $10,000 damage award "was not 'clearly within the reasonable range.' " (Petitioner's Appendix A, pp. 3A-5A.) The j.n.o.v. regarding punitive damages following the first trial was proper because in the absence of "egregious conduct or malice" to support punitive damages, there was no "evidence in the record to present a question of fact for the" jury. (Petitioner's Appendix A, pp. 6A-7A.)

The appeals court also agreed with the district court on the issues raised by the second trial. Denial of Mr. Mitchell's j.n.o.v. motion was correct because Rudolph/Libbe's evidence rebutting the claim of intentional race discrimination supported the jury's decision. (Petitioner's Appendix A, pp. 7A-8A.) Petitioner's jury instructions were properly denied because they did not differ significantly from those given and because Mr. Mitchell sought instructions arguing his case for him. (Petitioner's

Appendix A, p. 8A.) The Sixth Circuit upheld the exclusion of damages evidence predating the statute of limitations, since no damages award could extend to a time before the limitations period. (Petitioner's Appendix A, pp. 8A-9A.) The decision of the district court was affirmed. (Petitioner's Appendix A, p. 10A.)

Petitioner seeks review of the Sixth Circuit's decision by this Court.

SUMMARY OF ARGUMENT

The evidence does not support petitioner's argument that he has been injured by any "racial quota." To the contrary petitioner, as a minority person, should be benefitted by the equal employment opportunity plan and, absent any injury, does not even have standing to assert a claim related to the plan. Evidence relating to the plan assists in rebutting the assertion that respondent intentionally discriminated.

The appeals court applied accepted standards in deciding the motion, jury instructions, and evidence issues petitioner raises. None of the considerations governing review on certiorari apply here.

The petition for writ of certiorari should be denied.

ARGUMENT

1. Petitioner Has Not Been Harmed by Any Claimed "Racial Quota."

At the heart of the Petition for Writ of Certiorari is Rudolph/Libbe's participation in the Home Town Plan. Mr. Mitchell, a black man, contends that the Home Town Plan has fixed quotas which prevent minority employment. (Petition for Writ of Certiorari, pp. 2-3.) Petitioner claims that respondent has a 13 percent maximum minority hiring quota which denied him employment opportunities because he was black. (Petitioner's Appendix A, pp. 2A, 7A.) Rudolph/Libbe presented evidence contrary to these assertions. Respondent showed its employment decisions regarding petitioner were based on the absence of job openings or due to a lack of work. (Petitioner's Appendix A, p. 8A.) Rudolph/Libbe responded to the argument that its participation in the Home Town Plan was unlawful or discriminatory by showing that it was simply "monitor[ing] its minority workforce, in order to participate in federal and government projects" (Petitioner's Appendix A, p. 8A); the Home Town Plan was part of a federal government effort to assist "minority participation in the skilled construction trades." (Petitioner's Appendix A, p. 9A.) Rudolph/Libbe's evidence concerning the Home Town Plan was part of its proof which "rebutted [petitioner's] assertions of intentional discrimination." (Petitioner's Appendix A, p. 7A.)

This case is different from *Connecticut v. Teal*, 457 U.S. 440 (1982), a Title VII discriminatory impact case cited in the Petition for Writ of Certiorari. There, the petitioners sought to justify a discriminatory impact against the

respondent based on the petitioners' favorable treatment of other members of the respondent's racial group. *Teal*, 457 U.S. at 454. Here, however, evidence of Rudolph/Libbe's equal employment opportunities is relevant on the issue of discriminatory intent under Section 1981, as this Court recognized in *Teal*:

> The Court has stated that a nondiscriminatory "bottom line" and an employer's good faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action has been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978). See also *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977). But resolution of the factual question of intent is not what is in issue in this case.

Teal, 437 U.S. at 454. Rudolph/Libbe's evidence was relevant to show the absence of an intent to discriminate.

There is no evidence to support Mr. Mitchell's suggestion that the Home Town Plan has been used as a ceiling to prevent minority hirings by Rudolph/Libbe. (Petitioner's Appendix A, p. 7A.) The Home Town Plan was instituted by the Department of Labor as an effort to aid minorities to participate in the skilled construction trades. (Petitioner's Appendix A, p. 9A.) Participation in the Plan permits a contractor "to participate in federal and government projects." (Petitioner's Appendix A, p. 8A.) If a contractor is not meeting the goals of the Home

Town Plan, that contractor might be dropped from participation in the Home Town Plan.

2. Absent Injury, Petitioner Lacks Standing to Challenge the Employment Plan.

Having established that the Home Town Plan is not a ceiling which prevents minority employment and, specifically, that Rudolph/Libbe has no maximum quota for minority employment, the issue of Mr. Mitchell's standing is raised. Before a federal court will accept jurisdiction of an action, a case or controversy must be established within the meaning of Article III. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The plaintiff must have standing, in order to establish a case or controversy. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968).

The constitutional analysis of standing consists of three parts. First, a plaintiff must allege and prove a "distinct and palpable" injury. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Second, there must be a causal connection between the injury and the defendant's alleged conduct. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Third, assuming it is appropriate for the court to exercise its remedial powers, there must be a substantial probability that the claimed injury will be redressed by the action sought by the plaintiff. *Simon*, 426 U.S. at 26.

Here, there is simply no causal connection between the Home Town Plan, which seeks affirmatively to assist

minorities in their employment in the skilled construction trades, and petitioner's alleged injury, supposedly resulting from his exclusion from employment as a bricklayer. This is not a case like *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), in which the male petitioner was, at least arguably, adversely affected by an affirmative action plan in favor of females. Mr. Mitchell can simply have no complaint about the Home Town Plan, which will assist, rather than deter, his efforts as a minority person to gain employment in the skilled construction trades in the Toledo, Ohio, area.

3. A Writ Should Not Issue, Because the Appeals Court Applied Accepted Legal Standards.

a. *Judgment n.o.v.*

Petitioner's first "argument" is that the Home Town Plan is a quota system constituting malicious conduct, upon which the jury could award punitive damages; apparently, petitioner considers the j.n.o.v. on punitive damages to have been entered erroneously. (Petition for Writ of Certiorari, pp. 18-19.) There is no reason for this court to issue a writ of certiorari on this issue, since the Sixth Circuit applied accepted legal standards in deciding this issue. None of the considerations governing review on certiorari, under this Court's Rule 17, apply to this issue.

Punitive damages were awarded by the jury at the first trial, after which the district court granted respondent's motion for j.n.o.v. as to punitive damages. (Petitioner's Appendix A, p. 2A.) In reviewing the decision on

that motion for j.n.o.v., the Sixth Circuit applied the standard of *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The question is whether there is insufficient evidence in the record to present a question of fact for the jury's consideration; the question is one of law for a *de novo* determination by the reviewing court. *Morelock*, 586 F.2d at 1104-05. (Petitioner's Appendix A, p. 6A.) The Court of Appeals decided there was no evidence to support the punitive damages award:

> Upon careful review of the evidence *presented at the first trial*, the district court properly determined that the evidence could not support imposition of punitive damages. Evidence of Rudolph/Libbe's hiring practices demonstrated, at worst, a hiring system based on utilization of previously employed individuals. Recognizing that such a system, with a predominantly white workforce, might perpetuate the predominantly white workforce, Rudolph/Libbe used a minority hiring goal of 13 percent on all of its hiring, for both federal and nonfederal projects. Mitchell never once alleged or proved that less qualified white persons, or persons with a lesser connection to Rudolph/Libbe, were hired over him. The proportion established was higher than the proportion of minority bricklayers in the Toledo area. There was no showing of egregious conduct or malice which would permit the award of punitive damages.

(Petitioner's Appendix A, pp. 6A-7A.) The j.n.o.v. was held proper.

The claim of an alleged "quota system" was not even made at that first trial, when punitive damages were awarded. Only at the second trial did petitioner seek "to

base his entire claim on the evolution and use of a quota system." (Petitioner's Appendix A, p. 2A.) That second trial resulted in a defense judgment. (Petitioner's Appendix A, p. 2A.) Without any award in his favor at the second trial, petitioner cannot argue that he was entitled to punitive damages.

b. *Evidentiary ruling*

Petitioner next argues that he was prejudiced by the district court's refusal to permit him to introduce evidence concerning a "1974 quota system." (Petition for Writ of Certiorari, p. 19.) Mr. Mitchell is obviously referring to the Home Town Plan, which he claims Rudolph/Libbe established in 1974. (Petition for Writ of Certiorari, p. 2.)

At the second trial, the district court ruled that evidence relating to petitioner's damages was to be limited to the period of time from 1978, six years before the complaint was filed against respondent, *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 522 (6th Cir. 1975), until the time of trial. That limitation was only as to evidence of damages. The trial court did, however, permit evidence relating to the period of time prior to 1978 to show respondent's alleged intent to discriminate. (Petitioner's Appendix A, pp. 8A-9A.)

> Appellant could recover for injuries sustained after and including 1978, six years prior to his complaint's filing. At trial, the court allowed testimony of all of appellant's contacts with Rudolph/Libbe, namely his alleged first application and employment in 1978. It allowed

> testimony regarding the Toledo Area Affirmative Action Program for Construction Industry and Frederick Rudolph's role in its establishment. * * *

(Petitioner's Appendix A, p. 9A.) The Court of Appeals, citing to Fed. R. Evid. 401, simply found no error in this evidentiary ruling challenged by petitioner. (Petitioner's Appendix A, p. 9A.)

Petitioner does not even attempt to show that the Sixth Circuit's decision conflicts with the decision of another federal court of appeals, calls for the exercise of this Court's power of supervision, requires an important question of federal law to be settled by this Court, or otherwise meets the considerations governing review by certiorari by this Court.

c. *Jury instructions*

Mr. Mitchell's next "argument" is that this Court should review the Sixth Circuit's opinion upholding the district court's decision to not give two jury instructions requested by Mr. Mitchell. (Petition for Writ of Certiorari, p. 20.) The first of those two instructions related to proof of intentional discrimination and the second was an instruction about racial quotas. (*See* Petitioner's Appendix E, pp. 1E-2E.) The district court decided not to give either of the two requested instructions. The Sixth Circuit agreed with the district court, stating:

> The requested instructions were not significantly different from those given and the district court was not in error in rejecting them. In effect, [petitioner] sought instructions that

> argued his facts for him. [Respondent] was entitled to instructions that stated that it would not be liable if [petitioner] was not hired for "legitimate nondiscriminatory reasons." *See Price Waterhouse v. Hopkins,* 109 S. Ct. 1775, 1786 (1989) (plurality opinion).

(Petitioner's Appendix A, p. 8A.)

There is no reason for this Court to review the decision regarding jury instructions. That decision was consistent with this Court's and the federal courts of appeals' decisions regarding the burden of proof in a race discrimination in employment case under Section 1981.

d. *New trial*

Mitchell's final "argument" is that he was prejudiced when the second trial was on both liability and damages, and not limited to the issue of damages. (Petition for Writ of Certiorari, pp. 20-21.) The decision to grant a new trial on rejection of the remittitur was made because the $10,000 compensatory damages verdict was against the clear weight of the evidence: Mr. Mitchell's evidence showed, at best, two weeks' lost wages of $752 per week and the evidence concerning emotional distress did not meet the specificity required by *Carey v. Piphus,* 435 U.S. 247 (1978), and by *Rodgers v. Fisher Body Division, General Motors Corp.,* 739 F.2d 1102 (6th Cir. 1984). (Petitioner's Appendix C, pp. 4C-5C.)

Applying the accepted abuse of discretion standard to the decision to grant a new trial or request the filing of a remittitur, the Sixth Circuit Court of Appeals upheld that decision. (Petitioner's Appendix A, pp. 3A-5A.) The Sixth Circuit's opinion contains the following footnote:

> Conditioning a new trial with a remittitur is not a concession by the trial court that the liability issue is unassailable so that the new trial must be on damages only. The practice of a new trial conditioned on rejection of a remittitur is well established. *See* 11 *C. WRIGHT & A. MILLER, FED. PRAC. & PRO.* section 2815, at 100.

(Petitioner's Appendix A, p. 5A.)

Petitioner states no policy reason from Supreme Court Rule 17 for review on writ of certiorari of these issues concerning evidence, motions, and jury instructions. Because accepted legal standards were applied in deciding on these issues, this Court should decline review.

CONCLUSION

The petition for a writ of certiorari of petitioner James A. Mitchell, Jr. should be denied.

Respectfully submitted,

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